In the United States Court of Federal Claims

Case No. 04-1691C
For Publication
Filed: January 5, 2006

JOHNNY DUNCAN	*	
Plaintiff,	*	Motion to Dismiss, Lack of Subject Matter Jurisdiction, RCFC 12(h)(3); Tucker Act Jurisdiction; Fifth Amendment Due Process Claim; Military Review Board Unfettered Discretion; Arbitrary, Capricious, Contrary to Law, or Unsupported by Substantial Evidence; Res Judicata; Disability and Severance Pay, 10 U.S.C. §§ 1201-21 (2000); Military Pay Act, 37 U.S.C. § 204 (2000); Petition for Writ of Mandamus
v.	*	
THE UNITED STATES	*	
Defendant.	*	

OPINION AND ORDER

Smith, Sr. Judge:

The Court has reviewed Plaintiff's Complaint, Defendant's Statement of Facts, Defendant's Motion to Dismiss and Motion for Judgment on the Administrative Record, Plaintiff's Opposition and Cross Motion for Summary Judgment, Defendant's Reply and the Administrative Record. After review, the Court hereby GRANTS Defendant's Motion to Dismiss and for Judgment on the Administrative Record for the reasons below.

Relevant Facts and Background

Johnny Duncan, Plaintiff, served in the United States Army on active duty from 1981 to 1982 and was commissioned as a Second Lieutenant in the United States Army Reserves in 1982. He was promoted to First Lieutenant in 1984 and to Captain on May 9, 1988. Administrative Record (AR) at 3-4. To be eligible for promotion from Captain to Major, a person must complete Phase I and II of the Officer Advance Training Course and meet a seven year time in grade requirement.[1] AR at

[1] Plaintiff achieved the rank of Captain on May 9, 1988 and his seven year time in grade requirement for eligibility to Major was May of 1995.

5. Plaintiff completed Phase I of the Officer Advanced Training Course within the time in grade requirement but never completed Phase II of the course. AR at 6. Plaintiff was considered and passed up for promotion on March 6, 2001, and again on March 4, 2002.[2] Both promotion boards denied his promotion because he did not complete Phase II of the Officer Advanced Training Course, as required for promotion to Major according to Army Regulation 135-155. AR at 29-30. Thus, administrative separation proceedings were initiated against Plaintiff pursuant to Army Reg. 135-175 due to a two-time non-selection. AR at 34-35. Plaintiff was thereafter discharged from the United States Army Reserves on January 10, 2003 pursuant to 10 U.S.C. § 14513 and Army Reg. 140-10 for a two-time failure to meet promotion eligibility requirements established by the Army.[3] AR at 30.

While in the Army Reserves, Plaintiff underwent an Army medical exam on December 17, 1999 that indicated he was positive for the Human Immunodeficiency Virus (HIV). A second test, administered on January 22, 2000, confirmed the infection. AR at 23. A letter to Plaintiff dated June 25, 2003 from the Army states "an HIV test was administered 17 Dec 99 and was identified as positive . . . on 22 Jan 00 another (confirmatory) HIV test was conducted and identified as positive. Therefore, the HIV testing was conducted IAW [in accordance with] AR 160-110." Exhibit 2. The government contends this letter confirms that the HIV testing was done according to Army regulations. Plaintiff alleges that notifications of these positive results did not take place, in violation of Army regulations, and that he was unaware of his HIV positive status until admitted into a hospital on April 27, 2002. Compl. ¶¶ 32-36.

In March 2003, Plaintiff filed a complaint with the Inspector General alleging his HIV testing/counseling was done improperly, that the Army wrongfully failed to promote him to Major, and that he was entitled to pay for the January 2003 drill period. The Inspector General denied his claims on June 25, 2003. AR at 22-23. In April 2003 Plaintiff filed a disability claim with the Veterans Administration (VA). The VA found Plaintiff was not entitled to disability benefits because there was no connection between his service and the HIV infection. *Def. Mot. to Dismiss and Mot. for Judgment on the AR*, p. 4. In May of 2003, Plaintiff filed an application with the Army Board for Correction of Military Records (ABCMR) in which he requested an education waiver for promotion consideration, retroactive promotion to Major, and that his separation be changed to a medical discharge. All of the requests were denied by ABCMR in June 2004. AR at 1-10. In December 2003, Plaintiff filed suit in the United States District Court for the Eastern District of Louisiana alleging tort claims, wrongful discharge, entitlement to retroactive promotions with full

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[2] Plaintiff's promotion packet was inadvertently not considered between 1995 and 2000. This action was harmless because Plaintiff did not complete Phase II of the required education course during 1995 - 2000. Had he been considered for promotion during this period, he would not have met the requirements for promotion, and, therefore, he would have been dismissed on an earlier date. His promotion packet was first considered for promotion in 2001. AR at 5.

[3] Plaintiff's separation date was subsequently amended to January 13, 2003 to account for a drill on January 11-12, 2003 that Plaintiff attended. AR at 34; Ex. 16.

retirement benefits, and that the Army intentionally infected him with HIV. The court dismissed his complaint on May 18, 2004, *Duncan v. Sec'y of Defense*, No. Civ. A. 03-3373, 2004 WL 1118300 (E.D. La. May 18, 2004), and denied his Request for Reconsideration on October 29, 2004. *Duncan v. Sec'y. of Defense,* No. Civ. A. 03-3373, 2004 WL 2452773 (E.D. La. Oct. 29, 2004).

In the case at hand, Plaintiff alleges that: (a) he was entitled to a medical discharge based on his HIV status prior to his separation under Army Reg. 140-10; (b) the denial by the ABCMR for a change in his military record to a medical discharge was arbitrary and capricious; (c) the Army negligently and fraudulently withheld his HIV status from him, failed to release his medical records, failed to treat his infection, and failed to refer him to civilian doctors, which resulted in Plaintiff's advancement to Stage 6 HIV infection; (d) the intentional tort of battery for purposefully infecting him with HIV; and (e) a violation of his constitutional rights by forcing him to attend drill on January 11-12, 2003, after his separation without timely pay.

Plaintiff requests that the Court award the following relief: (1) correction of military records to reflect a medical discharge; (2) promotion to the rank of Major and retroactive back pay to 1995; (3) punitive damages in "treble the amount of other damages"; (4) past and future medical costs; (5) damages for spiritual and medical counseling in the amount of $500,000; (6) mandamus relief in the form of the release of records allegedly withheld from Plaintiff; (7) medical retirement and disability, retroactive to January 22, 2000; (8) damages to compensate plaintiff for loss of ability to engage in basic life activities in the amount of $1,674,000; (9) damages for loss of ability to engage in "basic life activity of sex" in the amount of $1,500,000; (10) damages for loss of consortium in the amount of $1,500,000; (11) damages for pain and suffering in the amount of $6,000,000; and (12) damages for mental anguish in the amount of $6,000,000.

Defendant filed a Motion to Dismiss and Motion for Judgment on the Administrative Record. Plaintiff filed his Motion in Opposition and Cross Motion for Summary Judgment. Thereafter Defendant filed its Reply.

Standard of Review

Plaintiff filed his complaint *pro se*. For the purposes of court filings, a *pro se* plaintiff's pleadings are held to a more lenient standard of review than formal pleadings drafted by attorneys. *Hughes v. Rowe*, 449 U.S. 5, 9 (1980). Therefore, *pro se* litigants' allegations, no matter how inartfully pleaded, are sufficient and allow the opportunity for the Plaintiff to offer evidence. *Haines v. Kerner*, 404 US 519, 520 (1972).

A motion for judgment on the administrative record under Rules of the United States Court of Federal Claims ("RCFC") 56.1 is treated under the RCFC as a motion for summary judgment. *See* RCFC 56.1 (a). Summary judgment is appropriate when there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. RCFC 56 (c); *Anderson v. Liberty Lobby Inc*., 477 U.S. 242, 247 (1986). A material fact is a fact that might affect the outcome of the suit under the law governing the case. *See Anderson*, 477 U.S. at 248 ("Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of

summary judgment.").

The standard of review that the Court applies to a military corrections board decision is whether the decision was arbitrary, capricious, unsupported by substantial evidence, or contrary to law or regulation. *Koster v. United States*, 685 F.2d 407, 411 (Ct. Cl. 1982). Plaintiff's proof to support reversal must be clear and convincing. *Wronke v. Marsh*, 787 F.2d 1569, 1576 (Fed. Cir. 1986). The Court must consider whether the ABCMR premised the challenged decision on "the relevant factors and whether there has been a clear error of judgment." *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974). This consideration merely requires the Court to make "a simple determination that a reasonable mind could support the challenged conclusion." *Donahue v. United States*, 33 Fed. Cl. 507, 510 (1995) (citing *Consolo v. Fed. Maritime Comm'n*, 383 U.S. 607, 619 (1966)).

A. Claims Outside this Court's Jurisdiction

Under RCFC 12(h)(3) this court must grant a motion to dismiss "whenever it appears . . . that the court lacks jurisdiction of the subject matter." RCFC 12 (h)(3). Under the Tucker Act the Court of Federal Claims has jurisdiction over monetary claims against the United States not "sounding in tort" 28 U.S.C. § 1491 (a)(1). *Hicks v. United States*, 23 Cl. Ct. 647 (1991). Plaintiff concedes that this Court does not have jurisdiction to hear tort claims. Pl.'s Mot. in Opp'n and Cross-Mot. for Summ. J. at pp.15-16. Therefore, Plaintiff's claims of negligence, fraudulent withholding of pay and records, fraudulent misrepresentation, conspiracy, battery, unspecified intentional tort claims towards the government for the Defendant's failure to follow Army Regulations, "violations of property interests in his life and well being, failure of the military to follow established rules" and guidelines, negligence and recklessness on the part of military medical personnel, and intentional and irreparable harm to his immune system are dismissed for lack of subject matter jurisdiction pursuant to RCFC 12(h)(3). *See* Pl. Compl.

In addition, the Tucker Act limits this Court's jurisdiction to those claims in which there is a substantive right to money damages against the United States. *James v. Caldera*, 159 F.3d 573, 580 (Fed. Cir. 1998). Plaintiff alleges violations of his constitutional rights under the Fifth and Fourteenth Amendment Due Process Clauses, neither of which are money mandating provisions that would invoke the jurisdiction of this court. One of the alleged violations is predicated on the Army's late payment of money owed for his attendance at a drill after his separation. Plaintiff was paid on June 18, 2003 for a drill performed by Plaintiff in January. AR at 22, Exhibit #4. Therefore, because the claim was paid, and because his only claim is for constitutional violations for late payment of money owed, the claim is not one for a mandatory payment of money damages and is outside the jurisdiction of this court. *See Ogden v. United States*, 61 Fed. Cl. 44, 47 (2004) ("This court may only render judgment for money when the violation of a constitutional provision . . . independently mandates payment of money damages by the United States.").

Plaintiff's claim of a Fifth Amendment due process right of deprivation of a property interest right in his employment is likewise not within the jurisdiction of this Court. *Bernard v. United States*, 59 Fed. Cl. 497, 502 (2004). "The remedy for violations of the Due Process Clause, apart

from Just Compensation claims, and the Equal Protection Clause, is not the payment of money but equitable relief that can only be afforded by an Article III court." *Id. See LeBlanc v. United States*, 50 F.3d 1025, 1028 (Fed. Cir. 1995) (holding that neither the Due Process Clauses of the Fifth and the Fourteenth Amendments, nor the Equal Protection Clause of the Fourteenth Amendment mandates money payment by the government and, therefore, cannot be a sufficient basis for jurisdiction).

Even so, the Court notes that military service members do not have a property interest in their employment, and can be discharged at any time with proper notice and an opportunity to respond to the act. *Milas v. United States*, 42 Fed. Cl. 704, 712 (1999) (stating that military discharges are given wide discretion as long as the mandatory procedural requirements are met, and the review did not violate the constitutional rights of the Plaintiff and were not prejudicial). The Court finds that Plaintiff was discharged with proper notice and Plaintiff availed himself of his right to respond to the discharge. *See generally* AR. Therefore, the Plaintiff's claims under the Fifth Amendment Due Process Clause must be dismissed.

Plaintiff also alleges a violation of his constitutional civil rights, citing the "Civil Rights Act," remedies for which are under the exclusive jurisdiction of the district courts. *See Marlin v. United States*, 63 Fed. Cl. 475, 476 (2005) ("[T]he Court does not have jurisdiction to consider civil rights claims brought pursuant to 42 U.S.C. §§ 1981, 1983, or 1985 because jurisdiction over claims arising under the Civil Rights Act resides exclusively in the district courts."). Therefore, these claims are also dismissed for lack of jurisdiction. [4]

B. Promotion Board and Separation from Service

Plaintiff asks this Court to grant him relief from the ABCMR decision denying his request for an education waiver for promotion consideration, retroactive promotion to Major, and that his separation from the Army be retroactively changed to a medical discharge.

The decision of the military review board is given unfettered discretion when it comes to the promotion of officers. *Murphy v. United States*, 993 F.2d 871, 873 (1993). The decision made by the review board to deny Plaintiff's promotion to the rank of Major is a routine military personnel matter for which a clear military standard exists, and the claim is non-justiciable and review of this court. *Voge v. United States*, 844 F.2d 776, 780 (1988). The Court's task is not to second-guess decisions made by the ABCMR and thereby act as a "super corrections board." *Wronke*, 787 F.2d at 1576. However, this Court has the ability to review the decisions of the ABCMR if the Plaintiff clearly establishes that the board's findings were "arbitrary, capricious, contrary to law, or

[4] Furthermore, the Court notes that the United States District Court for the Eastern District of Louisiana previously dismissed, with prejudice, Plaintiff's tort claims, statutory civil rights claims, and *Bivens* claim. AR 131; *Duncan*, 2004 WL 1118300. The District Court reached the merits of Plaintiff's claims, and its judgment is *res judicata*. Therefore, these claims cannot be considered in any court.

unsupported by substantial evidence." *Id.* at 1576. The decisions of the ABCMR are arbitrary and capricious when not supported by substantial evidence such that the decision is not based upon a complete and balanced consideration and review of all the relevant evidence before the board. *Fisher v. United States*, 402 F.3d 1167, 1180 (Fed. Cir. 2005). Claims are reviewed only if they are in violation of established mandatory procedure and are considered prejudicial to the Plaintiff. *Milas*, 42 Fed. Cl. at 712. But, it is not within the competency of this Court to review the conclusions made by the Army as to officer promotion and retention. *Lindsay v. United States*, 295 F.3d 1252, 1257 (Fed. Cir. 2002).

According to Army Reg. 135-155, the failure to complete education requirements will be a basis to deny promotion. Absent a violation of statute or regulation, military personnel do not have a viable cause of action for the review of their separation in this Court. *See Brigante v. United States*, 35 Fed. Cl. 526, 529 (1996). In response to Plaintiff's application for a correction of his military record, the ABCMR specifically stated that the reason for non-promotion on both reviews of Plaintiff's record was for failure to complete the education requirements. AR at 8. The findings of the ABCMR show that all relevant evidence available to it was considered. The Court finds this information was contemplated and balanced when the ABCMR made its ruling. AR at 1-10. The Administrative Record shows the Reserve Components Selection Board ("RCSB") followed standard procedures for promotion set out in Army Regulation 135-155. Upon the RCSB's review of Plaintiff's military record it determined that Plaintiff did not meet the educational requirements and therefore was not eligible for promotion.[5] AR at 29. Following the established military procedure, Plaintiff was notified of this deficiency by the Promotions Board. AR at 29-30. In its review, the ABCMR determined that the RSCB's decision had been correct, and in determining such the ABCMR followed normal military review procedure. AR at 1-9. The ABCMR's findings were in keeping with the law, not arbitrary or capricious, and supported by evidence. Therefore, the Court finds the Plaintiff's claim of unwarranted separation from duty must be denied.

C. Disability and Severance Pay

A claim can be brought in this Court by a service member, entitled by statute, to receive disability or severance pay if the service member is disabled as a result of, and while serving on, active duty. 10 U.S.C. §§ 1201-21 (2000); *Renicker v. United States*, 17 Cl. Ct. 611 (1989). After careful review, the record shows no evidence of Plaintiff's disability being service related or obtained while on active duty, the Plaintiff's unsubstantiated claims to the contrary notwithstanding. The Court finds Plaintiff does not present evidence that he received his disability as a result of his service and while serving on active duty per Army Reg. 635-640. In addition, for the service member to be placed on disability retirement, the member must be unable to perform his duties as determined by the Army. Army Reg. 635-40. The record before the Court demonstrates that Plaintiff was able to carry out his duties after the diagnosis of HIV through his unrelated separation

[5]If there is an error in the promotion proceeding, an officer cannot prevail in a challenge to a discharge for non-promotion if the government can demonstrate that the officer still would not have been promoted. *Christian v. United States*, 337 F.3d 1338, 1343 (2003).

from duty. AR at 8, 34. Therefore, the Court finds the claims for medical retirement and disability along with all damages relating to Plaintiff's medical condition must be denied.

E. Retroactive Pay and The Military Pay Act

Plaintiff asserts a money-mandating claim for retroactive pay to Major from 1995 and constructive service from the ABCMR decision date of June 3, 2004 under the Military Pay Act. The Tucker Act grants jurisdiction to this Court for claims for which there is an underlying substantive right to money damages against the United States. *Caldera*, 159 F.3d at 580. The Military Pay Act, 37 U.S.C. § 204 (2000), is a money mandating statute that allows service members who have been involuntarily separated a substantive right to seek damages against the United States in the Court of Federal Claims. *Spehr v. United States*, 51 Fed.Cl. 69, 82 (2001). Plaintiff's allegations of a failure to promote and involuntary separation are actionable under the Military Pay Act when there is a clear-cut legal entitlement to the promotion for which the service member has been denied. *Smith v. Sec'y of the Army*, 384 F.3d 1288, 1294 (Fed. Cir. 2004). The record shows that Plaintiff did not complete the required courses for promotion. AR at 2-10. Therefore, Plaintiff is not clearly entitled to a promotion, and Plaintiff's claims relating to back pay and retroactive promotion are denied.

Further, Plaintiff's allegations could be construed as being brought under 37 U.S.C. § 204 (g)(1) (2000), for claims of entitlement to pay and allowances for reserve service members with disabilities. This portion of the statute can only be invoked as a money mandating statute by the service member when the injury, illness, or disease was incurred or aggravated in the line of duty or immediate travel to or from such duty. *Id.* However, Plaintiff's disability was not shown in the record to have been incurred or aggravated in the line of duty. Therefore, even if the claims were brought under these provisions of the Military Pay Act, they must be dismissed.

Additional Claims

Plaintiff asks the court for a writ of mandamus for the military to turn over his medical records to the Veterans Administration. A writ of mandamus is an extraordinary remedy. *Roberts v. U.S. Dist. Court for Northern Dist. of Calif.*, 339 U.S. 844, 844 (1950). There are three conditions that must be met before the issuance by the Court of a writ of mandamus: 1) the moving party must have no other means to attain the relief he desires; 2) the moving party must satisfy the burden of showing that his right to the issuance of the writ is clear and undisputable; and 3) the issuing court must be satisfied that the writ is appropriate under the circumstances. 28 U.S.C. § 1651 (2000); *See Cheney v. U.S. Dist. Court for Dist. of Columbia*, 124 S.Ct. 2576, 2586-87 (2004). According to correspondence from the U.S. Army Personnel Command dated January 13, 2003, Plaintiff's records are currently housed in the National Personnel Records Center ("the Center") in St. Louis, MO. Because the records are obtainable by the Plaintiff through other sources, namely by requesting the records from the Center, the Court finds that a writ is not appropriate under the circumstances and is denied.

Conclusion

Defendant's Motion to Dismiss and for Judgment on the Administrative Record is therefore GRANTED, and the Clerk of the Court is directed to dismiss the complaint without prejudice.

It is so ORDERED.

LOREN A. SMITH,
Senior Judge